

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 28 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

REPLY COMMENTS OF TELHAWAII, INC.

TelHawaii, Inc. ("TelHawaii"), pursuant to Section 1.429(g) of the Commission's Rules, hereby submits these reply comments in response to GTE Service Corporation's comments on TelHawaii's Petition for Clarification of the Federal Communications Commission's May 7, 1997 Report and Order in the above captioned proceeding (the "Order").

I. INTRODUCTION

As TelHawaii described in its Petition for Clarification, TelHawaii is a rural local exchange carrier that has been authorized by the Hawaii Public Utilities Commission to provide local exchange services as the carrier of last resort in the Ka'u area of Hawaii. In naming TelHawaii as the incumbent local exchange carrier in Ka'u, the Hawaii PUC replaced GTE Hawaiian Tel with TelHawaii. The Commission just recently endorsed the Hawaii PUC's determination that it would serve the public interest to designate TelHawaii as the incumbent LEC in Ka'u when it granted TelHawaii's Petition for a Study Area Waiver altering GTE Hawaiian Tel's study area to permit TelHawaii to offer telecommunications services in Ka'u.¹

¹ See *Petition for Waivers Filed by TelAlaska, Inc. and TelHawaii, Inc.*, AAD 96-93, DA 97-1508 (rel. July 16, 1997).

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In these comments, TelHawaii urges the Commission to clarify that when the Commission adopted the freeze on universal service support based on embedded costs in paragraph 308 of the Order, it did not contemplate States taking the extraordinary action of replacing one incumbent carrier with another because of the prior carrier's history of providing inadequate telecommunications services to the geographic area at issue. As a result, the requirement that there be a binding commitment to purchase an exchange prior to May 7, 1997 in order to receive federal support based on costs should not be applied in these situations. In addition, the Commission should clarify that rural carriers in Hawaii should be treated similarly to rural carriers serving Alaska and other insular areas.

II. THE TRANSFER OF AN EXCHANGE ORDERED BY A STATE COMMISSION SHOULD BE EXEMPT FROM THE FREEZE PROVISION OF PARAGRAPH 308 OF THE ORDER.

When the Commission adopted the "binding commitment" provision in paragraph 308 of the Order that froze the distribution of universal service support based on embedded costs, the Commission appears to have only been considering those transactions in which the parties were relying on the existence of federal universal service support as the primary motivation behind the local exchange sale. This motivation is clearly not the case in those situations in which a State commission replaces one carrier with another because of a poor service record of offering inadequate services to customers in rural areas. The Commission, therefore, should declare that freeze policy contained in paragraph 308 is inappropriate in these situations when it reconsiders the Order.

Despite GTE's attempts to mischaracterize the Hawaii PUC's motivation in naming TelHawaii as the carrier of last resort in Ka'u as based solely on TelHawaii's access to

federal universal service funds,² the Hawaii PUC would not have replaced GTE Hawaiian Tel and designated TelHawaii as the new incumbent carrier had GTE Hawaiian Tel been providing adequate services in the Ka'u area.³ GTE does not, and cannot, dispute this fact. Moreover, the Hawaii PUC was acting well within the parameters established by Section 214(e) to designate TelHawaii as the only carrier eligible for federal universal service support in the Ka'u area.⁴

Contrary to GTE's assertions that the Hawaii PUC expressly conditioned its selection of TelHawaii on TelHawaii receiving federal USF support,⁵ the Hawaii PUC was reasonable to condition its designation of TelHawaii on TelHawaii obtaining Commission approval of the Ka'u service area, which, by implication, necessitated a change in GTE Hawaiian Tel's study area so that TelHawaii would be eligible for federal universal service support. Incident to this approval, however, is the fact that the Commission currently utilizes study areas as the basis for distributing universal service support and separating costs between inter- and intrastate services. Thus, the Hawaii PUC's motives in replacing GTE Hawaiian Tel with TelHawaii should not be second-guessed by GTE because it was ultimately GTE Hawaiian Tel's provision of inadequate services that led to its replacement in Ka'u. As a result, GTE is

² Comments of GTE at 9.

³ See Docket No. 7497, *In the Matter of GTE Hawaiian Telephone Company Incorporated, Investigation of GTE Hawaiian Telephone Company's Provision of Service in Rural Areas on the Island of Hawaii*, Decision and Order No. 13626 at 14, 15 (November 2, 1994).

⁴ 47 U.S.C. § 214(e).

⁵ *Id.*

unjustified to claim that TelHawaii was favored over GTE Hawaiian Tel because of the Hawaii PUC's unreasonable reliance on the availability of federal universal service support.⁶

III. THE COMMISSION SHOULD DESIGNATE HAWAII AS AN INSULAR AREA.

When TelHawaii requested that the Commission clarify that Hawaii is an insular area for purposes of the timetable by which rural carriers in Hawaii transition to obtaining universal service support based on forward looking costs, it did so specifically to ensure that rural carriers serving high cost areas not on the U.S. mainland be treated similarly. TelHawaii believes that had the Commission known that the Hawaii PUC had previously authorized TelHawaii to provide services as a rural carrier in Hawaii, it would have included Hawaii as one of the insular areas in which the Commission may afford special treatment in the transition to applying forward looking costs as the basis for universal service support. This is especially the case because the forward looking costs models currently under consideration do not contain data representative of rural, high cost areas in Hawaii.

Moreover, GTE's arguments that TelHawaii is currently not serving Hawaii is specious at best.⁷ TelHawaii would be providing service today in Ka'u if GTE Hawaiian Tel had negotiated with TelHawaii for the sale or use of its assets in Ka'u area. By way of brief background, after the Hawaii PUC designated TelHawaii as the carrier of last resort in the Ka'u area, GTE Hawaiian Tel appealed the Hawaii PUC's decision and requested a stay of that decision from the Hawaii Supreme Court pending the outcome of its appeal. On October 2,

⁶ Comments of GTE at 9.

⁷ *Id.* at 10.

1996, the Hawaii Supreme Court denied GTE Hawaiian Tel's motion for a stay of the decision naming TelHawaii as the carrier of last resort in the Ka'u area.⁸ As part of the Hawaii PUC's decision, GTE Hawaiian Tel was required to negotiate an agreement for the transfer to or use by TelHawaii of its assets in the Ka'u area. Notwithstanding this directive, GTE Hawaiian Tel refused to negotiate with TelHawaii for the transfer of its assets. As a result, TelHawaii initiated a proceeding at the Hawaii PUC seeking a ruling that exercise of TelHawaii's eminent domain authority over GTE Hawaiian Tel's assets in the Ka'u area was in the public interest. This step is necessary under Hawaii state law before a public utility, such as TelHawaii, may bring a condemnation action in the appropriate Hawaii state court to obtain the property at issue.

On May 23, 1997, the Hawaii PUC had "no difficulty in holding that the condemnation proposed by TelHawaii is in the public interest, that it is necessary, and that TelHawaii will use the property upon condemnation for its operations as a public utility."⁹ In making this finding, the Hawaii PUC determined that there are no less drastic means by which TelHawaii may provide the enhanced telecommunications services to the Ka'u area that GTE Hawaiian Tel has failed to provide. Thus, the Hawaii PUC found that it is in the public interest for TelHawaii to acquire GTE Hawaiian Tel's assets, rather than to permit TelHawaii to use GTE Hawaiian Tel's assets. In fact, the Hawaii PUC specifically rejected GTE Hawaiian Tel's arguments that interconnection with its facilities, resale of its services or purchase of unbundled system components are available to TelHawaii because each of these three methods will only

⁸ See Hawaii Supreme Court Order No. 20075, PUC No. 94-0346, (October 2, 1996).

⁹ Hawaii PUC Order No. 15602 at 13 (May 23, 1997) (see Attachment 1).

“perpetuate the deficient level of service that [GTE Hawaiian Tel] now provides.”¹⁰ As a result of this order, TelHawaii is now awaiting the Hawaii Supreme Court’s decision on GTE Hawaiian Tel’s appeal before exercising its condemnation authority in the appropriate Hawaii state court.

What TelHawaii seeks is only to be treated similarly to other rural LECs that offer services in high cost, insular areas. This request is meritorious because the Commission specifically has noted that rural carriers operating in Alaska and insular areas and offshore areas deserve special treatment during the transition to forward-looking costs because of the unique circumstances facing carriers in these areas.¹¹ Rural carriers operating in Hawaii face the same unique circumstances facing other insular areas, including higher shipping costs for equipment, damage by tropical storms, and extremely remote rural communities.¹²

GTE is again off the mark when it cites TelAlaska’s testimony from August 1995 for the proposition that Hawaii should not be regarded as an insular area.¹³ Specifically, TelAlaska had stated that it believed that “its cost of service in Hawaii will be less than its cost of service in Alaska.”¹⁴ TelAlaska proffered this opinion one year before the Hawaii PUC had even designated TelHawaii as the carrier of resort. Moreover, this statement certainly does not undermine the conclusion that providing service in rural areas in Hawaii will still be higher than providing service in non-insular areas.

¹⁰ *Id.* at 15.

¹¹ *Order* at ¶ 314.

¹² *Id.*

¹³ GTE Comments at 11.

¹⁴ *See* TelAlaska, Inc.’s Brief Hawaii PUC Docket No. 94-0346 (August 30, 1995) at 18-19. (see Attachment 2).

Once the Commission's new universal support distribution mechanisms are in place, TelHawaii will obtain its support under the new methodology. TelHawaii only asks that it be treated similarly to other rural carriers in insular areas until all rural carriers are required to obtain universal service support based on forward looking economic costs.

IV. CONCLUSION

For the foregoing reasons, TelHawaii respectfully requests that the Commission clarify its *Order* as described above.

Respectfully Submitted
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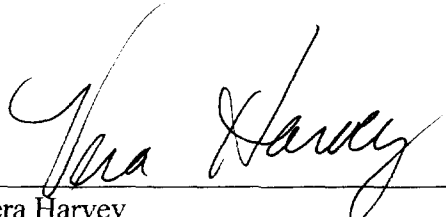
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CERTIFICATE OF SERVICE

I, Vera Harvey, hereby certify that I have this 28th day of August 1997 caused copies of the Reply Comments of TELHAWAII, INC., to be served by mail on the following:

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Vera Harvey

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

TELHAWAII, INC.)

Docket No. 97-0026

For Approval to Exercise Power of)
Eminent Domain to Acquire GTE)
Hawaiian Tel's Land, Easements and)
Appurtenances in the Ka'u Area.)

Decision and Order No. 15602

DECISION AND ORDER

I.

On January 27, 1997, TELHAWAII, INC. (TelHawaii) filed an application requesting that the commission make appropriate findings to enable TelHawaii to exercise the power of eminent domain and acquire GTE Hawaiian Telephone Company Incorporated's (GTE Hawaiian Tel) land, easements, and appurtenances in the Ka'u area of the island of Hawaii.

TelHawaii served copies of its application on GTE Hawaiian Tel and the Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs (Consumer Advocate). On February 18, 1997, GTE Hawaiian Tel moved to intervene in this docket.

By Order No. 15441, issued on March 11, 1997, the commission allowed GTE Hawaiian Tel to intervene and made the Consumer Advocate a party in the docket. The parties filed position statements on March 31, 1997, and presented oral argument to the commission on their positions on April 7, 1997.

II.

A.

This eminent domain action has its genesis in Docket No. 7497. In that docket, we investigated the provision of telephone service in the rural areas of the State. Our investigation culminated in Decision and Order No. 13626, issued on November 2, 1994. We concluded in that order that the telephone service provided by GTE Hawaiian Tel in the rural areas of the State was inadequate--that it did not meet the reasonable convenience and necessity of businesses and residents. That conclusion was based on our finding that telephone service was being provided mainly through multi-party lines, rather than single-party lines, and that GTE Hawaiian Tel was not providing the facilities necessary to support single-party lines and to meet the mounting demand for conversion from party-line to single-line service. We found that party-line service hampered business development and posed a threat to the health and safety of the residents in the rural areas. Many services associated with single-party lines (such as the use of fax and answering machines) and the ability of customers to access emergency services were being denied multi-party line customers.

In Decision and Order No. 13626, we ordered GTE Hawaiian Tel to develop an accelerated plan for the conversion of the rural areas from multi-party lines to single-party lines. At the same time, we acknowledged that at its 1994 session, the legislature enacted Act 80 (codified in Hawaii Revised Statutes (HRS) § 269-16.9(h)). Act 80 requires that if the commission determines that an area of the State has less than adequate telecommunications

service, the commission shall require the existing provider to show cause why the commission should not authorize an alternative telecommunications provider for the area. We stated in Decision and Order No. 13626 that pursuant to Act 80, we would open a docket to determine whether an alternative provider to GTE Hawaiian Tel should be certified to service the rural areas.

Pursuant to Decision and Order No. 13626, by Order No. 13679, issued on December 12, 1994, in Docket No. 94-0346, we directed GTE Hawaiian Tel to show cause why the commission should not select an alternative carrier to provide telecommunications services in the rural areas of the State. A year later on December 13, 1995, by Order No. 14415, the commission determined that GTE Hawaiian Tel had failed to meet its burden of demonstrating that it has the necessary commitment and ability to meet the telecommunications needs of its rural customers and that it had not shown cause why an alternative provider should not be authorized. The commission settled on a bid process as the appropriate means of selecting an alternative provider for the rural areas of the State and designated the Ka'u area as the first area for such a process.

The commission solicited bids from various telecommunications providers, including GTE Hawaiian Tel, for the Ka'u area and by Decision and Order No. 14789, filed on July 15, 1996, the commission selected TelHawaii as the successful bidder. In Decision and Order No. 14789, the commission also ordered GTE Hawaiian Tel and TelHawaii to negotiate, as required or appropriate, the transfer to or use by TelHawaii of GTE Hawaiian

Tel's assets in the Ka'u area to enable TelHawaii to commence service by May 15, 1997.

The parties were unable to negotiate an agreement for the sale to or use by TelHawaii of GTE Hawaiian Tel's assets in the Ka'u area. With GTE Hawaiian Tel refusing to negotiate any agreement other than an interconnection agreement with TelHawaii, TelHawaii saw no alternative but to seek condemnation of GTE Hawaiian Tel's assets in the Ka'u area.

B.

Section 6 of Act 134, Session Laws of Hawaii 1961, requires that, before exercising its power of eminent domain, a public utility must submit to the commission its intention to exercise the power with a description of the property to be condemned. The commission, in turn, must find that the proposed condemnation is in the public interest, that it is necessary, and that the public utility will use the property for its operations as a public utility. After the commission makes these findings, the utility may file a condemnation action in the circuit court to determine, among other issues, just compensation for the condemned property.¹

¹The basis of TelHawaii's application is not HRS § 101-43, but Act 134, Session Laws of Hawaii 1961. HRS § 101-43 applies only to irrigation corporations. The legislature applied section 6 of Act 134 to all public utilities having the power of eminent domain under section 8-4, Revised Laws of Hawaii 1995, as well as to irrigation corporations having the power of eminent domain under section 8-38, Revised Laws of Hawaii 1995. Section 8-4, Revised Laws of Hawaii 1995, is currently HRS § 101-4, and section 8-38, Revised Laws of Hawaii 1995, is currently HRS § 101-41.

Before we examine whether each of the elements specified by Act 134 has been satisfied, we dispose of GTE Hawaiian Tel's arguments concerning due process and the scope of the condemnation action allowed by statute to a public utility.

III.

A.

GTE Hawaiian Tel complains that it has not been afforded procedural due process in this docket. GTE Hawaiian Tel asserts that it should have been allowed to conduct discovery and to cross-examine witnesses in a full contested case proceeding.

The commission concludes that it accorded GTE Hawaiian Tel sufficient due process when it allowed GTE Hawaiian Tel, as well as TelHawaii and the Consumer Advocate, to file a position statement on TelHawaii's application and to present oral argument. As the Hawaii Supreme Court noted in Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 773 P.2d 250 (1989):

Due process is not a fixed concept requiring a specific procedural course in every situation. [D]ue process is flexible and calls for such procedural protections as the particular situation demands. The full rights of due process present in a court of law, including presentation of witnesses and cross-examination, do not automatically attach to a quasi-judicial hearing. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.

70 Haw. at 378 (citations and internal quotation marks omitted).

In Sandy Beach, taking a cue from Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court

pronounced that determination of the specific procedures required to satisfy due process requires a balancing of the following factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail. See Sandy Beach, 70 Haw. at 378; Mathews, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d. at 33. See also Applications of Herrick and Irish, 82 Haw. 329, 343, 922 P.2d 942, 956 (1996); Kernan v. Tanaka, 75 Haw. 1, 22-23, 856 P.2d 1207, 1218-1219 (1993).

We acknowledge that GTE Hawaiian Tel has a proprietary interest in the property to be condemned. However, this proceeding alone does not determine whether GTE Hawaiian Tel will be deprived of that property interest. The proceeding before the commission is not a condemnation proceeding. It is only to ascertain whether public interest will be served by the proposed condemnation, whether the condemnation is necessary, and whether the property, if condemned will be used by TelHawaii in its operations as a public utility. Any decision in this docket in favor of TelHawaii's application will not itself deprive GTE Hawaiian Tel of its property interest. GTE Hawaiian Tel will have further opportunity to protect its interest in the property proposed to be condemned in the actual condemnation proceeding before the circuit court.

When GTE Hawaiian Tel's property interest in this docket is weighed against the risk of erroneous deprivation of the property interest by the procedures actually used in this docket

and the probable value, if any, of additional or alternative procedural safeguards and the interest of government, the notice and hearing procedures followed in this docket constituted no violation of due process. GTE Hawaiian Tel was accorded ample opportunity to brief and orally argue its position on the issues presented in this docket; and no additional substantial information could have been elicited through discovery and cross-examination of witnesses, which GTE Hawaiian Tel asserts it was entitled to, to assist the commission in making its determination on the issues relevant in this proceeding.

GTE Hawaiian Tel gives as examples the following kinds of facts that it asserts it could have elicited through discovery and the cross-examination of witnesses: (1) the ability of TelHawaii to provide telecommunications services in the Ka'u area through interconnection of its facilities with those of GTE Hawaiian Tel or through the resale of GTE Hawaiian Tel's services or through the purchase of GTE Hawaiian Tel's unbundled elements; (2) the proposed condemnation's violation of the federal Telecommunications Act of 1996; and (3) whether TelHawaii would, in fact, put the property proposed to be condemned to public use superior to that which the property is already devoted.

We do not see how discovery and the cross-examination of witnesses on these matters would have added in any substantial way to the facts already known and acknowledged to exist by the parties about these matters. Both the federal Telecommunications Act of 1996 and Act 225, Session Laws of Hawaii 1995, require an incumbent local exchange carrier, such as GTE Hawaiian Tel, to enter into agreements with competitive local exchange carriers for

interconnection, resale, and the sale of unbundled elements. Thus, interconnection, resale, and unbundling as available options are not in dispute. The issue is whether TelHawaii is required to pursue these options rather than condemnation, and that is a legal issue, the determination of which requires no further elicitation of facts. Similarly, the question of whether TelHawaii's pursuit of condemnation is or is not in violation of the federal Telecommunications Act of 1996 is a legal issue, for the resolution of which no further facts are necessary. Finally, the resolution of the question of whether TelHawaii will put the property it seeks to condemn to public use superior to that which it is already devoted needs no facts other than TelHawaii's representation as to how it will use the property. In summary, the risk of erroneous deprivation of property and the probable value of discovery and cross-examination of witnesses are not so great as to require any more procedural safeguards than those afforded in this docket.

Further, the State and the national government have expressed strongly the policy of providing enhanced telecommunications services throughout the State and the nation, including the rural areas. This policy is clearly expressed in Act 225 and the federal Telecommunications Act of 1996. Thus, discovery and the cross-examination of witnesses as components of due process are neither necessary nor required to protect the property interests of GTE Hawaiian Tel when weighed against the strong public policy of encouraging the availability of enhanced telecommunications services.

B.

The assets to be condemned by TelHawaii include both real and personal property. GTE Hawaiian Tel asserts that a public utility may condemn only real property and not personal property. In support of this proposition, it cites HRS § 101-6 which provides:

Property which may be taken by virtue of this part includes all real estate belonging to any person, together with all structures and improvements thereon, franchises or appurtenances thereunto belong, water, water rights, and easements of every nature.

This section merely indicates that real property and the other properties specified in the section are included among the "property" that may be taken by condemnation. The section does not preclude the taking of personal property. Indeed, the inclusion of personal property among the "property" that may be taken by condemnation by a public utility is implied by Act 134. In section 2 of the Act, the legislature extended the terms of the franchises granted by the Territory of Hawaii to an indefinite period and provided, among other things, that these franchises are not to be construed to grant any exclusive right or privilege. Then, in section 3 of the Act, the legislature further amended each franchise to read as follows:

The said company shall have the right to acquire, hold or take over, either by purchase or lease, property, both real, personal or mixed, as may be necessary for the proper conduct of its business, but said company shall not have power or right to acquire the franchise or property of any other public utility company, except with the approval of the public utilities commission.

The implication is clear. A public utility may condemn both real and personal property as may be necessary for the proper conduct of the utility's business.² While the quoted section of Act 134 addresses franchises granted by the Territory of Hawaii, and TelHawaii is not one of those with a territorial franchise, nonetheless, it would not be equitable to invest some public utilities, but not others, with the right to condemn both real and personal property. The public utilities referred to in section 6 of Act 134 include, and the broad language of HRS § 101-4 which invests public utilities with the power of eminent domain applies to, all utilities, both those that are franchised and those that are not. Thus, we reject GTE Hawaiian Tel's argument that no personal property may be condemned by TelHawaii.

C.

GTE Hawaiian Tel posits that a public utility may not condemn property already devoted to a public use. It cites both statutory and case authority in support of this proposition. We do not agree with GTE Hawaiian Tel's reading and application of these statutes and cases.

GTE Hawaiian Tel cites HRS § 101-53. This section provides that for "public property" already appropriated to some public purpose to be condemned, it must be shown that the use to which the property will be put upon condemnation will be more

²Section 2 of Act 134 does not use the term "condemn," but, particularly in light of the empowerment of public utilities to condemn property in section 6 of the Act, the term "acquire," as used in section 2, may reasonably be construed to include acquisition by condemnation.

necessary than the purpose to which it is already appropriated. But HRS § 101-53 (which is a portion of part III of chapter 101) applies only to "public property," and "public property" is defined in HRS § 101-51 (which is also a portion of part III) as "real property (1) owned by a political subdivision of the State or (2) owned by the State in its own right and not owned by the United States." Section 101-53 does not apply to private property.

That property already devoted to public use may be condemned is further implied in section 3 of Act 134, quoted above. There the legislature provided that a company "shall not have power or right to acquire the franchise or property of any other public utility company, except with the approval of the public utilities commission." It is clear that one public utility may acquire the property of another public utility, with commission approval. Again, although section 3 dealt with franchised public utilities, equity requires that all public utilities be treated alike.

GTE Hawaiian Tel cites cases to support its proposition that property already devoted to a public use may not be condemned for the purpose of placing it to the same use by another. It asserts that the use to which TelHawaii intends to put GTE Hawaiian Tel's property upon condemnation (for telecommunications purposes) is no different from the use to which it is currently being put by GTE Hawaiian Tel. However, this proposition is no barrier to condemnation where the property will be put to a different use or to the same use in a different manner or when the benefits to be derived from the proposed use is greater than that being derived from its current use. See 1A Julius L. Sackman, Nichol's Eminent

Domain (rev. 3d ed. 1981), § 2.2[7] and § 2.2[9] at fn 3, pp. 2-100 and 2-101.

In the instant case, TelHawaii will repair and upgrade the GTE Hawaiian Tel facilities that it acquires by condemnation and will use them, together with the equipment TelHawaii proposes to install, to provide telecommunications services that are not now being provided by the use of the same assets by GTE Hawaiian Tel. TelHawaii will provide (indeed, by our order, it is required to provide) single-party line service with all enhanced and emergency number services that single-party lines and TelHawaii's digital equipment will be capable of providing. These services are not now being furnished by GTE Hawaiian Tel by its use of the assets proposed to be condemned.

Thus, the manner in which GTE Hawaiian Tel's assets will be used by TelHawaii is significantly different from the way in which they are currently being used. Although the present use and the proposed use are both for telecommunications purposes, the use to which TelHawaii will put the assets for telecommunications purposes is markedly different from the use to which they are presently being put by GTE Hawaiian Tel for telecommunications purposes. The use of the assets by TelHawaii and the benefits to be derived from that use are far superior to those currently being experienced. As expressed in Act 225, Session Laws of Hawaii 1995, the State's policy is to foster the development and maintenance of advanced telecommunications technology and services in both urban and rural areas of the State. In light of this policy, TelHawaii's intended use of GTE Hawaiian Tel's assets is necessary (indeed, far more necessary) than the use to which they are now devoted.

D.

Finally, GTE Hawaiian Tel asserts that condemnation of GTE Hawaiian Tel's assets by TelHawaii violates the federal Telecommunications Act of 1996. To the contrary, in our judgment the proposed condemnation is in furtherance of the purposes of the federal act. As in Act 225, a purpose of the federal Telecommunications Act of 1996 is expansion of advanced telecommunications services in the rural, as well as in the urban areas of the nation.

IV.

We have no difficulty in holding that the condemnation proposed to be undertaken by TelHawaii is in the public interest, that it is necessary, and that TelHawaii will use the property upon condemnation for its operations as a public utility. Our rationale follows.

A.

TelHawaii's proposed acquisition of GTE Hawaiian Tel's assets in the Ka'u area is in the public interest because, with those assets, repaired and upgraded by TelHawaii, and the advanced equipment TelHawaii will install, the Ka'u area will be provided with enhanced telecommunications services that it currently is not enjoying and which GTE Hawaiian Tel has failed to provide. The rural areas of the State, such as Ka'u, are entitled to the same level of services that those in the urban areas of the State enjoy or are capable of enjoying. The condemnation will provide the Ka'u area with opportunities for economic development and will

assure a level of service commensurate with the health and safety needs of the area.

GTE Hawaiian Tel's argument to the contrary is without merit. GTE Hawaiian Tel posits that there are less drastic means by which TelHawaii may provide service in the Ka'u area. It points to interconnection with GTE Hawaiian Tel's facilities, resale of GTE Hawaiian Tel's services, and purchase of unbundled GTE Hawaiian Tel's system components. None of these "options" serves TelHawaii's purposes.

Interconnection will require the building by TelHawaii of facilities that will duplicate those owned by GTE Hawaiian Tel in the Ka'u area. The cost of such an undertaking would be formidable, the project would take years to complete, and duplicating facilities is not practical in the sparsely populated area of Ka'u.

Resale of GTE Hawaiian Tel's service in the area is not realistic. We have already determined that GTE Hawaiian Tel's service in the area is not adequate. TelHawaii intends to provide far superior service than that now being provided by GTE Hawaiian Tel.

Finally, the purchase by TelHawaii of GTE Hawaiian Tel's unbundled elements will require extensive negotiations on the price to be paid for those elements. TelHawaii is required by commission order to provide advanced telecommunications services in the Ka'u area as quickly as possible. As the experience of others in negotiating resale and purchase of unbundled elements with GTE Hawaiian Tel has proven, such negotiations are drawn-out

processes where parties have difficulty agreeing on the price to be paid.

B.

TelHawaii's proposed condemnation of GTE Hawaiian Tel's assets in the Ka'u area is necessary. The assets are needed if TelHawaii is to provide the services required by the commission within the time allowed. Neither the building of duplicate facilities nor interconnection with GTE Hawaiian Tel's existing facilities, as argued for by GTE Hawaiian Tel, is a feasible alternative. Indeed, interconnection with GTE Hawaiian Tel's facilities, which we determined to be inadequate, may only perpetuate the deficient level of service that GTE Hawaiian Tel now provides.

C.

TelHawaii will use the condemned assets in its operations as a public utility. GTE Hawaiian Tel makes no forceful argument to the contrary. Indeed, GTE Hawaiian Tel does not seriously dispute that TelHawaii will use the condemned assets for TelHawaii's operations as a telecommunications provider in the Ka'u area. GTE Hawaiian Tel only points to what it considers to be an anomaly--that is, if GTE Hawaiian Tel's facilities are out-dated and inadequate, how can the facilities be useful for public utility purposes as intended by TelHawaii (i.e., to provide advanced telecommunications services). GTE Hawaiian Tel misconstrues TelHawaii's intent.

TelHawaii does not intend to use GTE Hawaiian Tel's facilities in the manner GTE Hawaiian Tel is currently using them. TelHawaii intends to install advanced switching and other equipment that, together with GTE Hawaiian Tel's facilities that TelHawaii will repair and upgrade, will allow TelHawaii to provide service that is much improved and superior to that now being provided with those facilities by GTE Hawaiian Tel.

V.

THE COMMISSION MAKES THE FOLLOWING FINDINGS:

1. The condemnation proposed by TelHawaii is in the public interest.
2. The condemnation proposed by TelHawaii is necessary.
3. TelHawaii will use the property that TelHawaii proposes to condemn for its operations as a public utility.

DONE at Honolulu, Hawaii this 23rd day of May, 1997.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

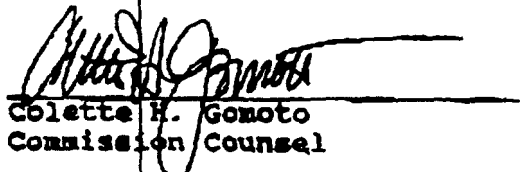
By


Yukio Naito, Chairman

By


Dennis R. Yamada, Commissioner

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